STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1694-1,	)	
Charging Party,	)	**ULP 15-05-999**
v.	)	**PROBABLE CAUSE DETERMINATION**
DIAMOND STATE PORT CORPORATION,	)	
Respondent.	)	

BACKGROUND

The Diamond State Port Corporation (DSPC) is a public employer within the meaning of 19 Del. C. §1302(p) of the Public Employment Relations Act, 19 Del.C. Chapter 13 ("PERA").

The International Longshoremen's Association (ILA) is an employee representative within the meaning of 19 Del.C. §1302(i). By and through its affiliated Local 1694-1 (Local 1694-1), the ILA is the exclusive bargaining representative of a bargaining unit of DSPC cargo handling and warehouse employees within the meaning of 19 Del.C. §1302(j).

DSPC and ILA 1694-1 are parties to a collective bargaining agreement which has a term of the October 1, 2013 through September 30, 2016.

On May 18, 2015, the ILA filed an unfair labor practice charge with the Public Employment Relations Board (PERB) alleging DSPC engaged in conduct which violated 19 Del.C. §1307(a)(1), (a)(2) and (a)(5), which state:

> §1307 (a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

> (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
> (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject.

Specifically, the Charge alleges that on or about April 13, 2015, DSPC posted a job announcement for a "Plant Maintenance" position which was materially different in its description of both the minimum qualifications and the nature of the work performed sections from a previous posting for a Plant Maintenance vacancy in March, 1997. The ILA alleges the creation of a new bargaining unit position is a mandatory subject of bargaining over which the parties are obligated to bargain under the PERA. It asserts DSPC has failed and refused to negotiate both the creation and the effects of the creation of this new position, in violation of the PERA. The ILA requests DSPC be directed to rescind the new position and its effects. The ILA also requests it be awarded attorney fees and costs associated with the filing of this Charge.

On May 28, 2015, DSPC filed its Answer to the Charge admitting a Job Announcement was posted on April 13, 2015 for a Plant Maintenance vacancy. It specifically denies the posting constitutes a new position or classification. It asserts that job content, requirements and qualifications for a position are not mandatory subjects of bargaining but are matters of inherent managerial policy reserved to the employer's discretion by 19 Del.C. §1305. Included in its Answer is new matter in which DSPC asserts the Charge fails to state a claim for which relief can be granted under the PERA. DSPC also asserts the Charge is untimely[1], appending to its Answer a Plant Maintenance Mechanic posting it asserts was posted in December, 2000, and to which it contends the April, 2015 Plant Maintenance posting is identical.

[1] "…[N]o complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the Board." 19 Del.C. §1308(a).

On June 11, 2015, the ILA filed its Response to New Matter in which it denied DSPC's legal assertions set forth therein.

This determination results from a review of the pleadings.

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

> Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred. If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with provisions set forth in Regulation 7.4. The Board will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.
>
> If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings; otherwise he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC,* ULP 04-10-453, V PERB 3179, 3182 (Probable Cause Determination, 2004).

The issue raised by this Charge is not whether the content of the April, 2015 Plant Maintenance job posting conflicts with provisions of the collective bargaining agreement. Any dispute related thereto is a matter for resolution through the parties' negotiated contractual grievance and arbitration procedure.

This Charge alleges the content of the posting is materially different from prior postings for this position[2] and therefore constitutes the creation of a new bargaining unit position, which it asserts is a mandatory subject of bargaining. This is an issue which has not been previously addressed by the PERB.

Analysis of a scope of negotiability issue begins with the understanding that an underlying premise of the PERA is to promote negotiations concerning a broad and encompassing scope of bargaining. There is a rebuttable presumption that issues should be negotiated and should only be excluded where it is clear that a matter is "either not a term and condition of employment, unequivocally falls within the definition of inherent managerial discretion, or where the impact of the proposal on the [employer's operation] as a whole 'clearly outweighs' the 'direct impact' on employees." *Laurel Education Association v. Laurel School District*, BIA 13-12-934, VIII PERB 6131, 6167 (2014).

Section 1305 of the PERA enumerates matters of inherent managerial policy which are reserved to the discretion of the public employer, including "organizational structure and staffing levels and selection and direction of personnel." An employer cannot be required to bargain these types of policy matters and is accorded the freedom to choose whether it wishes to negotiate or legally declines to do so concerning these matters.

In order to prevail in this matter, the ILA must establish that DSPC has failed or refused to bargain with respect to a mandatory subject of bargaining, in violation of its good-faith bargaining obligations. If it is determined the posting and/or its content is a not a mandatory subject of bargaining, the Charge will be subject to dismissal.

The State has raised an objection to the timeliness of the Charge. The document

[2] I note that the 1997 posting appended to the Charge as Exhibit A is a posting for a "Plant and Maintenance Assistant" position; the alleged 2000 posting appended to the State's Answer as Exhibit A is for a "Plant Maintenance Mechanic" position; and the April 2015 posting in issue, appended to the Charge as Exhibit B is for a "Plant Maintenance" position.

appended to the Answer which it asserts supports the conclusion that the posting has not changed since 2000, is undated. *Answer Exhibit A.* The ILA asserts in its Response to New Matter that the hourly wage rate on the posting is not the rate which would have been in effect in December, 2000. Consequently, there are factual issues related to the timeliness defense on which further evidence must be submitted and considered.

The pleadings raise both factual and legal questions, which require an evidentiary record and receipt and consideration of argument from the parties to resolve.

DETERMINATION

For the reasons set forth above, the pleadings are sufficient to support the further processing of this charge and raise both factual and legal questions concerning the content of the posting for bargaining unit vacancies.

A hearing will be promptly scheduled for the purpose of establishing a factual record upon which argument can be made and a decision rendered. The issue to be addressed is whether DSPC violated 19 Del.C. §1307 (a)(1), (a)(2) and/or (a)(5), as alleged, by modifying or creating and posting a new position without bargaining with respect to a mandatory subject of bargaining.

Date: August 6, 2015

Charles D. Long, Jr.

Charles D. Long,
Hearing Officer,
Public Employment Relations Board